

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

MATTHEW LAVALSIT

(your name)

Appellant.

No.

41986-6-II

STATE OF WASHINGTON

DEPUTY

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

11 DEC 12 AM 11:11

I, MATTHEW LAVALSIT, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

PLEASE SEE AND REVIEW THE ATTACHED WHICH

INCLUDES THE COURT'S INSTRUCTIONS TO THE JURY.

Additional Ground 2

PLEASE SEE AND REVIEW THE ATTACHED WHICH

INCLUDES THE COURT'S INSTRUCTIONS TO THE JURY.

If there are additional grounds, a brief summary is attached to this statement. PLEASE SEE AND REVIEW
GROUND 3 AND 4 WHICH INCLUDES THE COURT'S INSTRUCTIONS TO
THE JURY. THANK YOU FOR YOUR TIME AND CONSIDERATION.

Date: 12/12/2011

Signature: Matthew Lavalait

Form 23

CERTIFICATE OF SERVICE

I certify that I mailed, emailed
1 copies of SAG
to APPELLANT, P
& CLERK'S OFFICE
12/12/11
Date Signed

ADDITIONAL GROUND 1

Defendant was denied effective assistance of counsel when counsel for the defense failed to cross-examine the alleged victim, R.M. Dusty Vonberg, to verify if Ms. Vonberg was performing nursing/health care duties and regarding her presence in the home of Shirley Bower and Debra Upshal, daughter and caretaker of Shirley, on July 26, 2010 – a critical element of the defense. In trial court, R.M. Dusty Vonberg stated that she did not have an appointment, and Ms. Vonberg stated that she did not perform medical attention on Shirley Bower. Cross-examination would have established that Shirley Bower was not an admitted patient of R.M. Dusty Vonberg, she did not have an appointment to be there, and Ms. Vonberg did not perform nursing duties. If the performance by counsel for the defense had not been deficient, it would have shown that R.M. Dusty Vonberg was not at the home in an official nursing capacity or performing nursing or health care duties. Ms. Vonberg was not assaulted, and she was not allegedly assaulted while performing her nursing or health care duties. On July 26, 2010. After Ms. Vonberg was not able to reach Shirley or Debra by phone, she made a pre-meditated decision, along with social worker Jan Kerman, to go to the home without a nursing/health care appointment. Ms. Vonberg and Ms. Kerman entered the home without permission. The homeowner, Debra Upshal, reported Ms. Vonberg to the police as breaking into her home and trespassing under false pretenses. If the counsel for defense had not been deficient in her assistance of counsel, this would have been submitted as evidence for the defense. In addition, the trial court would not have inaccurately presented R.M. Dusty Vonberg being assaulted while performing her nursing duties as favorable evidence for the plaintiff and in the presence of the jury by providing Instruction No. 6 in the Court's Instructions To The Jury document. There is a reasonable probability that effective cross-examination of the alleged victim by the counsel for the defense would have resulted in a reasonable doubt in the plaintiff's case.

ADDITIONAL GROUND 2

The Court's Instructions To The Jury includes Instruction No. 6 for the jury to consider when there was no evidence submitted during the trial relevant to the law stated in the instructions. Instruction No. 6 states "A person commits the crime of assault in the third degree when he or she assaults a nurse who was performing his or her nursing or health care duties at the time of the assault." Instruction No. 6 assumes that R.M. Dusty Vonberg was assaulted while performing her nursing or health care duties at the time of the assault. This was assumed by the Fire Department EMT's, the police, the prosecutor's office and the trial court. This was not evidence brought before the jury in trial court by either the counsel for the State or the defense. Because Instruction No. 6 was not evidence submitted in trial court, it should not have been given to the jury as part of their deliberation on the verdict. Instruction No. 6 places severe prejudice against the defendant. (Reference Additional Ground 1)

ADDITIONAL GROUND 3

The Court's Instructions To The Jury show bias by the trial court in the presence of the jury by not including an equal weight of instructions to the jury on the laws that must be applied to the facts or evidence heard from the plaintiff-the State of Washington. Equal emphasis was not placed on the instructions for the jury on the laws to follow regarding evidence submitted by the plaintiff. The jury did not receive sufficient instruction on laws to apply to the plaintiff's evidence during deliberation of the verdict. Bias is repeatedly demonstrated against the defendant by Instruction No. 6, 7, 8, 9 and 10 in the Court's Instructions To The Jury. These instructions are provided by the judge for the jury to accept as the law when reviewing the evidence presented against the defendant. The Court's Instructions To The Jury places the weight of the jury's focus on the deliberation of laws against the defense and weighs toward a guilty verdict against the defendant. A complete copy of the Court's Instructions To The Jury is attached as supporting evidence.

ADDITIONAL GROUND 4

In Instruction No. 10 of the Court's Instructions To The Jury, the jury was provided with an element that should have been stricken from the criteria used to determine the verdict.

The four elements outlined in Instructions No. 10 include Item #3 which states, "That at the time of the assault R.M. Dusty Vonberg was performing her nursing or health care duties;"

As previously stated in the above Ground 1 and Ground 2, evidence was not established and submitted in trial court to the jury on this alleged evidence. Element item #3 of Instruction No. 10 should not have been given to the jury for deliberation.

Instruction No. 10 of The Court's Instructions To The Jury states as follows:

"To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:"

And, "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty."

And, "On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty."

The jury did not have "all" the accurate elements when applying the instructions during deliberation of the verdict. Due to this defect, the jury could not have reached a correct verdict.

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

MATTHEW NMI LAVALSIT,

Defendant.

)
) No. 10-1-00707-3
)
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COURT'S INSTRUCTIONS TO THE JURY

DATED

3/16/11

Sally F. Olsen, JUDGE

COPY

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed

in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION No. 5

A witness who has special training, education or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

A person commits the crime of assault in the third degree when he or she assaults a nurse who was performing his or her nursing or health care duties at the time of the assault.

Instruction No. 7

An assault is an intentional touching of another person that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 8

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION No. 9

Physical injury means physical pain or injury, illness, or an impairment of physical condition.

INSTRUCTION NO. 10

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 26, 2010, the defendant assaulted R. M. Dusty Vonberg,
- (2) That R. M. Dusty Vonberg was a nurse;
- (3) That at the time of the assault R. M. Dusty Vonberg was performing her nursing or health care duties;
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given any exhibits admitted in evidence, these instructions, and a verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

MATTHEW NMI LAVALSIT,

Defendant.

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No. 10-1-00707-3

VERDICT FORM.

1. We, the jury, find the defendant Matthew Nmi Lavalsit—

☐ **Not Guilty** of the crime of Assault in the Third Degree as charged in count I.

☐ **Guilty** of the crime of Assault in the Third Degree as charged in count I.

DATE: _____

Presiding Juror's Signature

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)
) No. 10-1-00707-3
)
) Plaintiff,)
) QUESTION FROM DELIBERATING JURY
)
) v.)
)
) MATTHEW NMI LAVALSIT,)
)
) Defendant.)
 _____)

Jurors: If, after carefully reviewing the evidence and instructions, you need to ask the court a procedural or legal question that you have been unable to answer, then write down your question on this form. Please print legibly. Do not state how the jury has voted.

JURY'S QUESTION: _____

DATE AND TIME: _____
_____ Presiding Juror's Signature

COURT'S ANSWER (after consulting with attorneys): _____

DATE AND TIME: _____
_____ Judge's Signature